

FINDINGS OF FACT

I

On August 30, 1985, the Department of Ecology issued Order No. DE 85-667 to Herbert Kummer and Rande A. Kummer. The Order stated:

The Department of Ecology is responsible for the supervision of public waters within the state and their appropriation, diversion (withdrawal), storage (dam safety), and use.

In March 1980 Mr. and Mrs. Kummer submitted an application for change of Water Right Certificate No. 367 and No. 895. In September 1982, Department of Ecology staff issued two Reports of Examination and a letter which included instructions to the Kummers to use water as provided in the two reports of examination.

In July 1985, Department of Ecology staff observed water use by the Kummers, in Section 3 and 10, Township 28N., Range 43 E.W.M., that is not in compliance with provisions of the two reports of examination and constitutes violation of RCW 90.03.250 and 90.03.010.

In view of the foregoing and in accordance with the provisions of RCW 43.27A.190:

IT IS ORDERED THAT Mr. Herbert Kummer and Rande A. Kummer shall, upon receipt of this Order, take appropriate action in accordance with the following instructions:

1. Cease and desist Bear Creek surface water withdrawal for beneficial use on land in excess of 30 acres, as provided for in Certificate No. 367 and No. 895, and
2. Define the exact location of 30 acres authorized under No. 367 and No. 895 and provide a legal description of said acreage to the Department of Ecology, Eastern Regional Office, within 15 days of receipt of this Order.

II

On September 26, 1985, the Board received the Kummers' appeal of this Order and assigned it cause number PCHB 85-188.

III

On April 11, 1986, Ecology filed a Motion for Summary Judgment. Oral argument was heard on May 19, 1986. The Board issued its ruling

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1 in writing on May 27, 1986.

2 The Board's ruling is attached as Appendix 1 and incorporated into
3 this decision. The Board preserved for hearing the factual question
4 of the extent of the Kummers' irrigation in July of 1985. However, a
5 judgment was rendered on the legal issue of whether the Kummers' water
6 right certificates authorize them to irrigate more than 15 acres per
7 year under each certificate -- a total of 30 acres during any
8 irrigation season.

9 IV

10 The Kummers own a farm which includes lands within Sections 3 and
11 10, Township 28 North, Range 43 East Willamette Meridian. Bear Creek
12 runs through this property on its way to joining the Little Spokane
13 River.

14 Two certificates of water right refer to irrigation from the creek
15 on described portions of the Kummers' land: Certificate 367(priority
16 1926) and Certificate 895(priority 1919).

17 As originally issued, Certificate 367 memorialized the perfection
18 of a right to divert at the rate of 0.3 cubic feet per second (cfs)
19 for the irrigation of 15 acres within E1/2NW1/4NE1/4 of Section 10 --
20 a 20 acre area. As originally issued, Certificate 895 confirmed an
21 appropriation at the rate of 0.25 cfs for the irrigation of 15 acres
22 within SE1/4NE1/4 of Section 10 -- a 40 acre area.

23 V

24 Twenty years ago Herbert Kummer asked the state about the
25 possibility of acquiring rights to irrigate additional acres. In a

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1 letter from a predecessor of the Department of Ecology, dated October
2 14, 1966, he was advised that the "quantities authorized in a
3 certificate of water right may not be increased," and that permission
4 to use additional water could only be acquired by filing a new
5 application. He was further told, however, that any new application
6 would in all probability be rejected. The reason given was that the
7 Bear Creek watershed had been closed to further consumptive
8 appropriation since 1953 in the interests of preserving fisheries
9 resources. The closure was in response to a recommendation of the
10 Departments of Fisheries and Game.

11 VI

12 In 1976, Ecology adopted chapter 173-555 WAC, a water resource
13 program for the Little Spokane River Basin. WAC 173-555-060
14 explicitly ratified and continued the closure of Bear Creek "to
15 further consumptive appropriation except for domestic and normal
16 stockwatering purposes."

17 VII

18 In the late 1970's and early 1980's, Ecology became concerned that
19 the Kummers were irrigating acres different from those described as
20 the place of use on their certificates and that more acres than
21 authorized were being irrigated.. The communication of these concerns
22 to the Kummers resulted in their filing applications to change the
23 place of use for both certificates.

24 On September 24, 1982, Ecology issued its reports on these
25 applications, concluding that the requested changes should be
26 granted. For Certificate 395, the report summerized as follows:

1 The Kummers will be able to irrigate 15 acres within an
2 estimated 71.4 acres of irrigable land within the legal
3 place of use requested in any one year at a diversion rate
not to exceed 0.3 cubic feet per second.

4 For Certificate 895, the report summarized as follows:

5 The Kummers will be able to irrigate 15 acres within an
6 estimated 30 acres of irrigable land within the legal place
of use requested in any one year at a diversion rate not to
exceed 0.25 cubic feet per second.

7
8 Each of the reports provided that the Certificate of Change should
9 include the following condition:

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12 No more than 15 acres of land will be irrigated in the changed
13 place of use in any one year; this being determined by the first 15
acres beneficially irrigated.

14 VIII

15 Ecology's decisions on the applications for change of place of use
16 were not appealed by the Kummers.

17 IX

18 On three dates in July of 1985, Ecology personnel observed the
19 Kummer irrigation operations from the ground. On each of these visits
20 they saw different parcels being irrigated. The aggregate of acres
21 irrigated was in the neighborhood of 80 to 90.

22 On July 26, 1985, an Ecology inspector made an overflight of the
23 Kummer farm and took photographs. His observations were that 80 or
24 more acres on the farm bore clear evidence of recent irrigation.

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X

At a meeting with Ecology personnel in late July 1985, Rande Kummer did not deny irrigating more than 15 acres per certificate that year. He stated his belief that each certificate allows him to irrigate the entire legally described place of use during a season, so long as, under each certificate, he irrigates no more than 15 acres at any one time.

XI

In addition to using two authorized points of diversion from Bear Creek, the Kummers withdraw water from a well on their property for irrigation use. They contend that the irrigation of acreage in excess of 30 acres in 1985 could have been attributable to use of the well and that Ecology did not affirmatively show that the excessive irrigation was solely from the creek.

The Kummers do not have a permit, certificate or other claim of right to use the well as a water source for irrigation. Their authority to use public waters is limited to the two surface water certificates already identified.

XII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

RCW 43.27A.190 authorizes the Department of Ecology to issue

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1 regulatory orders whenever it appears that "a person is violating or
2 about to violate" any of the provisions of any water resources
3 management statute or rules implementing such a statute. See RCW
4 43.21A.060(2).

5 II

6 Appropriators of either surface or ground waters are limited to
7 the use of water as specified in permits and certificates issued by
8 Ecology. RCW 90.030.010, 90.03.250, 90.03.290, 90.44.020, 90.44.060.
9 Any rights the Kummers have acquired to irrigate any land at all must
10 be within the scope of the permission granted by the state.

11 III

12 With respect to the legally described places of use the Kummers
13 have sought authority to irrigate, Ecology has imposed explicit and
14 unambiguous limits. Under each certificate only 15 acres may be
15 beneficially irrigated during any year. By logical necessity this
16 restricts irrigation under each certificate to the first 15 acres
17 irrigated in the year. The total number of acres on the farm which
18 may be irrigated is thus 30 per annum.

19 As a matter of law, the Kummers simply have not acquired the right
20 to irrigate more than this.

21 IV

22 We are persuaded that, during July of 1985, the Kummers irrigated
23 more than 30 acres overall. That some of the water may have come from
24 a ground water source is irrelevant to the question of their authority
25 to irrigate more than 30 acres. We construe the regulatory order

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1 issued here to be directed toward the cessation of all unauthorized
2 irrigation.

3 To the extent that the Kummers exceeded the acreage limitations
4 engrafted on their certificates, their water use was unauthorized and
5 in violation of the water codes of the state. Accordingly the
6 regulatory order issued by Ecology on August 30, 1985 (Order No. DE
7 85-667) was entirely lawful and appropriate.

8 V

9 The Kummers have sought to question the validity of the acreage
10 limitation Ecology has imposed. In this enforcement proceeding it is
11 too late to challenge the substantive provisions of the permission to
12 irrigate which the state previously granted. Ecology's decisions on
13 the Kummers' applications for change of place of use became final when
14 no appeal was filed within 30 days of their receipt by the Kummers.
15 RCW 43.21B.120.

16 VI

17 Were we able to entertain the issue of the validity of the acreage
18 limitation, the result would be the same. All water rights permits,
19 when issued, are by that very nature limited according to the acreage
20 to which the water may be applied. RCW 90.03.290. We interpret the
21 original certificates here to restrict the holders thereof to an
22 annual duty of water necessary for growing crops on 15 acres of land
23 per certificate. The conditions imposed in response to the subsequent
24 applications for change of place of use are not, therefore, a
25 redefinition of what was originally granted. These conditions are

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1 simply a clearer statement of what was originally granted.

2 If more than 15 acres is irrigated under a certificate in a
3 season, there is a substantial danger that the duty of water for 15
4 acres worth of crops will be exceeded. Such water consumption would
5 be an expansion of the use authorized.

6 Moreover, even if through conservation practices more than 15
7 acres could be irrigated within the normal water duty for 15 acres,
8 irrigation of the additional acres would be unauthorized. Under the
9 Doctrine of Beneficial Use, any reduction in water use on the initial
10 15 acres inures to the benefit of other water users and the public.
11 See, Salt River Valley Users' Ass'n v. Kovacovich, 3 Ariz. App.28, 411
12 P.2nd 201 (1966).

13 VII

14 At hearing, appellants filed a Motion for Clarification of our
15 Summary Judgment Order of May 27, 1986. We trust this opinion
16 adequately responds to that request.

17 VIII

18 Any Finding of Fact which should be deemed a Conclusion of Law is
19 hereby adapted as such.

20 From these Conclusions the Board enters this
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ORDER

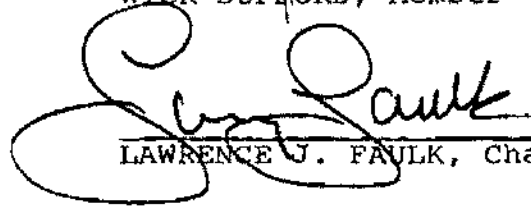
The regulatory order (No. DE 85-667) issued by the Department of Ecology to Herbert and Rande A. Kummer on August 30, 1985, is affirmed.

DONE at Olympia this 20th day of January, 1987.

POLLUTION CONTROL HEARINGS BOARD



WICK DUFFORD, Member



1/20/87

LAWRENCE J. FAULK, Chairman

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